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Hanging Together

For more than a year, Congress has been threatening to pass a "names of agents" law that, for the first time in American history, would prevent private citizens from publishing or otherwise disclosing certain information from unclassified sources [see editorial, "Crying Wolf," *The Nation*, August 30-September 6, 1980]. Now that the threat is about to become reality, the sole remaining question appears to be whether citizens should be punished only when they have "the intent to impair or impede the foreign intelligence activities of the United States," or whether mere "reason to believe" their activities would impair or impede is sufficient.

The debate over this language is significant—not only because it could determine the reach of legislation that those who are close to the process tell us is sure to pass but because it has raised the perennial questions of means and ends, of expediency and principle, that have so bitterly divided civil libertarians in the past and now threaten to do so again.

The American Civil Liberties Union has opposed any names of agents bill as inherently unconstitutional. Nevertheless, when it became probable that Congress would pass some version of it, the A.C.L.U., without abandoning its constitutional objections, worked to narrow the language to require proof of criminal intent. Morton Halperin and Jerry Berman, representing the A.C.L.U., have argued that while both versions violate the First Amendment, the "intent" language would have a less chilling effect on free speech.

After intensive lobbying by the A.C.L.U., including a controversial secret meeting with representatives of the Central Intelligence Agency, the House Intelligence Committee accepted the narrower "intent" language on July 22. When the bill (H.R. 4) hit the House floor on September 23, however, the sparks began to fly—from left and right. Representative John Ashbrook, the conservative Ohio Republican, introduced an amendment, favored by the Administration, that substituted the "reason to believe" test. "The language that I object to is American Civil Liberties Union language," Ashbrook said. "I see no reason whatsoever that the members of this body should accommodate what we think is right to the requests, the demands or whatever we want to call them of the American Civil Liberties Union. We should not let Jerry Berman and Morton Halperin have that kind of influence on this body." The House agreed, and the Ashbrook amendment passed overwhelmingly, as did the bill.

Some on the left were equally outraged by the tactics of the A.C.L.U. "It is wrong—politically, morally and strategically—for the American Civil Liberties Union to choose between two concededly unconstitutional versions of the bill and to seek actively the adoption of the so-called lesser of two evils," Bill Schaap, editor of *Covert Action Information Bulletin*, charged in a recent debate with Halperin in New York City. "The A.C.L.U. . . . lost no time in distancing itself—as it has so often in the past—from the least popular victims of the repression they are charged and expected to resist," Schaap said.

Schaap also criticized the A.C.L.U. for meeting with the C.I.A. His words called to mind the controversy that surrounded a meeting in 1939 of Morris Ernst, counsel for the A.C.L.U., and Martin Dies, chairman of the House Special Committee on Un-American Activities. (After that visit, and some say because of it, the A.C.L.U. expelled Elizabeth Gurley Flynn, a Communist Party member, from its board, thus setting a sad precedent for much that was to follow in the postwar attack on civil liberties.)

The issue now, however, is not—or should not be—the performance of the A.C.L.U., which is no longer the organization it was during the 1950s (it has even restored Flynn to its board posthumously), and has been in the forefront of the fight to protect the First Amendment. Rather, three important questions must be carefully addressed. First, does working for the lesser evil inevitably mean accepting and legitimizing the assumptions one ought to be challenging? Second, there is a whole constellation of questions having to do with identifying the enemy and deciding how best to resist, on a case by case basis, the new wave of attacks on the First Amendment. Third, and perhaps most crucial at this juncture, how can we debate honest differences over tactics without repeating the fragmentation among the victims that occurred during the domestic cold war?

If it is true that the danger of the lesser-evil approach is that it may give legitimacy to bad measures, it is also true that making a bad law less bad is a worthy undertaking. Civil libertarians have long debated such issues of tactics and strategy, and no doubt will continue to do so [see *The Nation*: editorial, "Grandson of S. 1," November 3, 1979; symposium, "Chartering the F.B.I.," October 6, 1979, and symposium, "The Red Squad Settlements Controversy," July 11-18], and we will provide a forum for that debate in the weeks and months ahead.

But an absolute precondition for such a debate is that we keep in sight the source and the nature of the danger. The Senate is about to take up the names of agents bill (S. 391), the Administration is trying to gut the Freedom of Information Act, and there is a draft of a new executive order floating about that would unleash the C.I.A. on domestic dissent. In this climate, there is a compelling need to recognize that the pre-eminent threat to civil liberties today comes not from colleagues with the wrong tactics but from an Administration and a Congress that are poised to do fundamental damage to the Bill of Rights. Perhaps now is the time for the A.C.L.U. and other organizations in the business of defending civil liberties to hold a general meeting with potential defendants and thrash out the tactical issues that threaten to divide us.